

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 21-0121

PATRICK R. WEINERT

Claimant-Petitioner

V.

XE SERVICES, LLC

and

INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA

Employer/Carrier-Respondents

[illegible]

DATE ISSUED: 10/08/2021

DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of
Timothy J. McGrath, Administrative Appeals Judge, United States
Department of Labor.

Stephen P. Moschetta (The Moschetta Law Firm, P.C.), Washington, Pennsylvania, for Claimant.

James M. Mesnard (Postol Law Firm, P.C.), McLean, Virginia, for Employer/Carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Timothy J. McGrath's Supplemental Decision and Order Awarding Attorney Fees (2018-LDA-00442) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as

amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant sustained physical and psychological injuries while working for Employer in Afghanistan. In his Decision and Order Awarding Benefits dated May 29, 2020, the ALJ awarded Claimant ongoing temporary total disability benefits from July 29, 2010, and medical benefits relating to Claimant's psychological condition.¹ Thereafter, Claimant's counsel filed an attorney's fee petition with the ALJ seeking \$52,875 for 141 hours of attorney work at an hourly rate of \$375. Employer objected to the requested hourly rate and to various time entries. Counsel also requested an additional \$2,550 (6.8 hours of attorney work at \$375 per hour) for time spent responding to Employer's objections. The ALJ reduced the requested hourly rate, as well as the total number of hours that counsel claimed, and approved an attorney's fee payable by Employer of \$45,535, representing 130.1 hours at an hourly rate of \$350.²

On appeal, Claimant's counsel challenges the ALJ's reductions in his requested hourly rate and number of hours that he claimed, including his denial of all but one hour associated with the filing of his reply to Employer's objections. Employer responds, urging affirmance of the ALJ's decision.

¹ Employer appealed the ALJ's award of total disability benefits for the period from October 14, 2015, to April 26, 2018, as well as his refusal, on reconsideration, to reopen the record. The Board vacated the ALJ's findings that Claimant's post-injury job with McLaughlin Transportation Systems, Incorporated, is not suitable alternate employment and that Claimant is entitled to total disability benefits from March 12, 2018, and remanded the case for consideration of all relevant evidence and a determination as to whether Claimant expended extraordinary effort to perform this work. *Weinert v. XE Services, LLC*, BRB No. 20-0431 (Sept. 22, 2021) (unpub.) (Buzzard, J., concurring and dissenting). The Board affirmed the ALJ's decision in all other respects. *Id.*

² He further noted, in light of Employer's appeal to the Board of his underlying award of benefits, *see* n.1 *supra*, his Supplemental Decision and Order Awarding Attorney's Fees is neither enforceable nor payable until a final decision is issued in this case.

Hourly Rate

Claimant's counsel contends the ALJ erred in rejecting all the evidence offered to support his requested hourly rate of \$375 and instead using an improperly recycled hourly rate of \$350 that an ALJ awarded counsel in a 2014 decision in another case. Counsel maintains, given the passage of time from that award, the modest \$25 increase in his requested hourly rate for work performed in 2018 is reasonable, warranted, and supported by the documentation submitted with his fee petition.

The United States Supreme Court has held the lodestar method, in which the number of hours reasonably expended in preparing and litigating a case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under federal fee-shifting statutes such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Court has also held an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also Perdue*, 559 U.S. at 551. Thus, in this case, once the ALJ determined Pittsburgh, Pennsylvania, is the relevant community for determining counsel's hourly rate,³ *see* Attorney Fee Order at 3, the burden was on Claimant's counsel to produce satisfactory evidence "that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11.

In support of his hourly rate request, Claimant's counsel presented: his curriculum vitae; two decisions that the U.S. District Court for the Western District of Pennsylvania issued awarding attorney's fees in civil rights cases under 42 U.S.C. §1983;⁴ and two ALJ decisions awarding counsel attorney's fees under the Act. We find the ALJ's award of an hourly rate of \$350 is arbitrary. He did not consider counsel's position that, given the passage of time, "the modest \$25 increase" in his requested hourly rate for work conducted

³ We affirm the ALJ's finding of Pittsburgh as the relevant community as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

⁴ The two district court fee awards were issued in 2012 and 2015, and involved other attorneys in the Pittsburgh area. Claimant alleges the 2012 case awarded hourly rates of \$300 to an attorney "with less experience" and \$475 to an attorney with "7 years more" experience. The 2015 case awarded an hourly rate of \$525 to "an attorney with similar experience and skill" according to Claimant's counsel. Cl. Br. at 10; Attorney's Fee Petition at 5.

in 2018 from the 2014 decision awarding an hourly rate of \$350 “is reasonable and warranted.”⁵ Fee Petition Supporting Br. at 6. In this respect, the ALJ did not consider counsel’s statement that his “market and billing” hourly rate changed from \$350 to \$375, as did the hourly rates of the other members of his firm, as of March 2, 2018.⁶ Thus, we vacate the ALJ’s award of an hourly rate of \$350 and remand for reconsideration of this issue. On remand, in determining the prevailing market rate for counsel’s services, the ALJ must address these considerations that counsel raised before him, as well as the sufficiency of counsel’s evidence. *See generally Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

Denied Time Entries

Counsel contends the ALJ’s decision lacks sufficient explanation and justification for reductions in time on 22 entries documenting work he performed between April 4, 2018, and July 28, 2020. He maintains the ALJ summarily reduced all of these entries to .1 hours and failed to recognize that “[n]ot all emails take 6 minutes” to compose and those entries also included time expended on counsel’s notes for the case file. Counsel further contends the ALJ abused his discretion in reducing by half his entries dated June 6 and 7, and October 30, 2018, involving preparation for the depositions of Claimant and Employer’s vocational expert, Susan Rapant.⁷

An attorney’s work is compensable if the hours claimed are “reasonable” for the “necessary work done” in the case and the fee is commensurate with the degree of success obtained. *See* 20 C.F.R. §702.132(a); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Thus, the ALJ may, within his discretion, disallow a fee for hours found to be duplicative, excessive, or unnecessary. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT). An ALJ is afforded “considerable deference” in determining what hours are “excessive, redundant, or otherwise unnecessary.” *Id.*, 511 F.3d at 956, 41 BRBS at

⁵ Employer’s objections to the requested hourly rate, which center on the lack of comparability in practice areas between the U.S. District Court cases to this case, did not address counsel’s “passage of time” argument.

⁶ The regulation at 20 C.F.R. §702.132(a) requires the attorney to state his “normal billing rate.”

⁷ Counsel states that because of Claimant’s “very serious problems with anger and aggression since the injury,” it was important to work slowly and carefully over an extended period in order to cover, in great detail, “very difficult and emotionally charged topics.” Cl. Br. at 16-17.

57(CRT). Given the ALJ's superior understanding of the underlying litigation, he is in the best position to make this determination. *Id.*; *see also Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011).

The ALJ permissibly reduced the 22 “confidential” entries,⁸ as well as the time counsel requested for work performed on June 6, 7, and October 30, 2018, as excessive. Supplemental Decision and Order Awarding Attorney Fees at 3, 5. Contrary to counsel's contention, the ALJ did not summarily reduce the “confidential” entries. In each instance, he considered the descriptions counsel provided to determine the nature of the work performed and thereafter permissibly found the time claimed in these entries excessive. *Id.* at 4.

As for the other challenged entries, the ALJ, having presided over this case and the hearing, was well aware of Claimant's demeanor and the evidence the parties submitted. The ALJ found the 7.8 hours relating to work performed on June 6 and 7, 2018, excessive. He recognized that client communication “is one of the most important aspects of an attorney's representation,” but permissibly found the requested 7.8 hours over two days to essentially discuss case strategy with Claimant “is not reasonable.” *Id.* at 5. The ALJ also permissibly found the 3 hours counsel requested for work performed on October 30, 2018, to “[p]repare cross-examination for Susan Rapant deposition” excessive, given that the deposition itself only lasted 2.4 hours. *Id.* at 6. In both instances, the ALJ reduced the requested hours in half and therefore allowed, as reasonable, 3.9 and 1.5 hours for the work counsel performed on June 7-8 and October 30, 2018, respectively.⁹ Consequently, the ALJ, after reviewing the pertinent information, fully explained his reasons for the reductions made to counsel's requested hours. Given the considerable deference afforded the ALJ, counsel has not demonstrated an abuse of the ALJ's discretion with regard to these reductions. *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *see generally Fox*, 131 S.Ct. at 2216; *see also Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006). Accordingly, we affirm them.

⁸ These entries referenced emails and phone conversations between Claimant and his counsel described as “confidential.” Attorney's Fee Petition Ex. 1. After submission of the parties' pleadings, the ALJ requested and received from counsel an unredacted version of all “confidential” time entries for *in camera* review. Supplemental Decision and Order Awarding Attorney Fees at 2. The ALJ stated he made “these reductions” based on his review of the unredacted version of the fee petition submitted *in camera*. *Id.* at 4, n.3.

⁹ Moreover, the ALJ separately awarded counsel 3.4 hours (1.5 and 1.9 hours, respectively, for work performed on August 8, and October 22, 2018) to “review, summarize, research” Ms. Rapant's most recent labor market survey.

Response to Employer's Objections

Counsel contends the ALJ erred, as a matter of law, in denying his request for an additional award of 6.8 hours spent defending his fee petition by responding to Employer's objections. Counsel states he is entitled to an award for all of this time because the ALJ "[r]ejected many of Employer's objections." Cl. Br. at 19.

It is well established that a claimant's attorney is entitled to a reasonable fee for defending a fee award. *See generally Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009) (disallowing a portion of the fee requested for work on a reply brief when the response was disproportionate to the objections); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). As noted previously, the test to determine the compensability of an attorney's work is whether the hours claimed are "reasonable" for the "necessary work done," *see* 20 C.F.R. §702.132(a), with the ALJ being in the best position to make such determinations.

The ALJ observed counsel sought and was awarded 2.3 hours for the preparation of his attorney's fee petition,¹⁰ but then subsequently sought an additional 6.8 hours for responding to Employer's eight pages of objections.¹¹ Counsel broke down his requested time as follows: 1.1 hours to "conduct legal research re fee objections," and 5.7 hours to "review" fee objections and "draft/revise" a response to those objections. The ALJ reviewed counsel's response both in terms of Employer's objections and counsel's initial fee petition. Exercising his broad discretion, he permissibly concluded that much of the work performed in counsel's response involved time expended to correct errors that should not have been made in counsel's original fee petition. The ALJ thus concluded that 1 hour represents a reasonable amount for work relating to the successful defense of counsel's fee petition. We affirm the ALJ's reduction in the time requested for counsel's response to Employer's objections by 5.8 hours and the resulting award of 1 hour for such work because counsel has not demonstrated the ALJ abused his discretion. *Beckwith*, 43 BRBS at 157.

¹⁰ This document consisted of a 7-page supporting statement, along with 47 pages of supporting documentation contained in six exhibits, including 15 pages of time entries.

¹¹ Counsel's response to Employer's objections consisted of a 14-page memo and 3 pages of exhibits, including 1 page of time entries for the work performed in accomplishing this task.

Accordingly, we vacate the ALJ's hourly rate determination, affirm his reductions of counsel's requested hours, and remand for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge